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To be argued by
WALTER E. DILLON
and
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Office Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1960

No. 111

BURTON N. PUGACH,

Petitioner,

against

HONORABLE ISIDORE DOLLINGER, District Attorney of Bronx County, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

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District Attorney, County of Bronx,
Attorney for Respondents.

WALTER E. DILLON,
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BRIEF FOR RESPONDENTS

Opinions Below

The opinion of the Court of Appeals for the Second Circuit, affirming the judgment and order of the United States District Court for the Southern District of New York, dismissing the complaint and denying a temporary injunction, respectively, is reported at 277 F. 2d 739. The opinion of the District Court is reported at 180 F. Supp. 66.

Question Presented

Do the federal courts have jurisdiction to intervene in State criminal proceedings to suppress the use of evidence allegedly secured in violation of Section 605 of the Federal Communications Act?

The Complaint and Motion for a Temporary Injunction

Petitioner, Burton N. Pugach, a citizen of New York, alleged in his complaint that respondents and their agents, after securing an order from the Supreme Court of the State of New York permitting them to tap his wires, intercepted telephonic communications, thus obtaining certain information.

It is further asserted that respondents divulged the information obtained to the Grand Jury of Bronx County, as a result of which Pugach and three others were indicted for the crimes of Maiming, Burglary, Assault and Conspiracy. In another indictment, Pugach alone, was charged with a violation of Section 1897, subd. 5a, N. Y. Penal Law (Possession of a loaded gun without a written license).

Pugach further alleged upon information and belief that respondents intend to use the evidence secured from the wiretaps upon the trial of the aforementioned indictments in the County Court, Bronx County. He claimed that a conviction upon the trial at which the wiretap evidence is introduced will cause him irreparable damage such as the loss of his license to practice law and the revocation of a liquor license issued by the New York State Liquor Authority, besides subjecting him to personal punishment.

Since he assumed a disclosure by respondents of the wiretap evidence at the trial of the indictments in the County Court, Bronx County, will violate Section 605 of the Federal Communications Act, petitioner demanded the following relief:

1. That respondents and their agents be prohibited and enjoined from proceeding against petitioner upon the indictments in the County Court, Bronx County, "on any grounds in which they may use wiretapping evidence, or on any grounds or investigations resulting from or instituted as a result of the aforesaid illegal wiretaps".

2. That respondents be directed to turn over to petitioner any and all wiretaps and recordings of the petitioner.

The papers in support of petitioner's motion for a temporary stay were substantially consistent with his complaint and added nothing significant thereto.

The Factual Background

In November 1959, petitioner Pugach and three others were jointly indicted by the Grand Jury of Bronx County, State of New York, for the crimes of Maiming, Burglary, Assault and Conspiracy. The maiming count of the indictment, which is the principal charge, is predicated upon Pugach's alleged participation in the acid blinding of a young woman.

At the same time, another indictment was lodged against Pugach for a violation of Section 1897, subd. 5a, N. Y. Penal Law (Possession of a loaded gun without a written license).

The trial of the indictment for Maiming, etc., was set down for January 7, 1960. About two weeks before the trial was to begin and after extensive preparations had been made by the prosecution, petitioner brought the present action in the District Court against the Police Commissioner of the City of New York and the district attorney of Bronx County.

As a result of the instant suit and the temporary injunctions granted by the Circuit Court, the trial of the indictment for Maiming, *et cetera*, has been delayed. Thus far, the case has not been tried.

On February 24, 1960, the respondent district attorney proceeded to trial on the indictment against Pugach for the weapon violation. The jury rendered a verdict finding Pugach guilty as charged.

The Proceedings in the Federal Courts

The instant suit was brought in the District Court, Southern District of New York, on December 24, 1959. Together with the service of the complaint herein, petitioner served his papers on a motion for an injunction *pendente lite*. Respondents made a cross-motion for the dismissal of the complaint.

The motion and cross-motion came on to be heard before Judge Frederick Van Pelt Bryan, who then asked respondents to adjourn the State criminal trial to afford him ample time to consider the matter. In accordance with this request, the district attorney consented to a postponement of the trial in the County Court.

On January 13, 1960, Judge Bryan denied petitioner's application for the temporary injunctive relief and granted the cross-motion to dismiss the complaint.

An appeal from the judgment was then taken by petitioner to the United States Court of Appeals for the Second Circuit. On February 11, 1960, that Court (Medina and Waterman, J.J.—Madden, J. dissenting) granted an application made by petitioner to restrain respondents, pending the determination of the appeal, from using and disclosing wiretap evidence at the trials in the County Court, Bronx County, on the two indictments there pending against petitioner.

On April 14, 1960, the Circuit Court affirmed the judgment of the District Court and vacated the stay which had been granted on February 11, 1960.

On April 26, 1960, the Circuit Court denied a rehearing but enjoined respondents from using and disclosing wiretap evidence until May 16, 1960 and provided further that if on or before said date there is filed a certificate of the Clerk of the Supreme Court that a certiorari petition, record and briefs have been filed, the stay shall continue until the final disposition of the case by the Supreme Court.

On May 16, 1960, an *ex parte order* was granted by two Judges of the Circuit Court enlarging the time of petitioner to file the aforementioned certificate up to and including May 31, 1960. The petition was filed within the extended period.

On July 12, 1960, the Circuit Court enlarged the scope of the injunction "to include the fruits of the wiretapping as well as the intercepted messages."

ARGUMENT

POINT ONE

Federal courts should not intervene in State criminal proceedings to suppress the use of evidence.

In *Stefanelli* v. *Minard*, 342 U. S. 117, a parallel problem to the one at bar was presented for consideration. Justice Frankfurter, writing for the Court, declared (342 U. S. at pp. 120, 123):

> "We hold that the federal courts should refuse to intervene in State criminal proceedings to suppress the use of evidence even when claimed to have been secured by unlawful search and seizure. The maxim that equity will not enjoin a criminal prosecution summarizes centuries of weighty experience in Anglo-American law. It is impressively reinforced when not merely the relations between coordinate courts but between coordinate political authorities are in issue."
>
> * * *
>
> "The consequences of exercising the equitable power here invoked are not the concern of a merely doctrinaire alertness to protect the proper sphere of the States in enforcing their criminal law. If we were to sanction this intervention, we would expose every State criminal prosecution to insupportable disruption. Every question of procedural due process of law—with its far-flung and undefined range—would invite a flanking movement against the system of State courts by resort to the federal forum, with

> review if need be to this Court, to determine the issue. Asserted unconstitutionality in the impaneling and selection of the grand and petit juries, in the failure to appoint counsel, in the admission of a confession, in the creation of an unfair trial atmosphere, in the misconduct of the trial court—all would provide ready opportunities, which conscientious counsel might be bound to employ, to subvert the orderly, effective prosecution of local crime in local courts. To suggest these difficulties is to recognize their solution."

The wisdom of this Court's opinion in *Stefanelli* v. *Minard, supra*, has been demonstrated by the interference resulting from this action encountered by the People of the State of New York in their endeavor to prosecute criminal charges against petitioner unhindered by a determination, made in advance of the trial of the indictments, suppressing the use of evidence.

Respondents respectfully submit that all rulings as to the admissibility or suppression of evidence must necessarily be made by the trial court alone, subject, of course, to review upon appeal from the judgment. There cannot be an orderly presentation of a case where such determinations are made beforehand in an abstract way.

Petitioner's only concern in the instant action has been to secure temporary injunctions in the Federal courts to prevent the speedy and effective prosecution of the criminal charges. Surprisingly enough, he has succeeded in obtaining this drastic relief upon a complaint which had been dismissed and upon a bare claim wholly unsupported by fact—a claim which he could not even hope to establish at a trial.

The present action was brought for a *permanent* injunction. This relief can be granted only after a trial of this suit in the United States District Court.

Respondents respectfully ask this Court to consider the serious consequences which would flow from the trial of this

action, brought, as it was, in the Federal court by a defendant under indictment in a State court against the State prosecutor, prior to the trial of the criminal charge in the State court.

To permit an action of this kind to be maintained would virtually be tantamount to a declaration that persons indicted for crime by a State government may, upon a bare claim of wiretapping, seek in a Federal tribunal an examination of the State prosecutor and police as to the evidence upon which the indictment was found and as to the evidence which the district attorney intends to introduce to prove the criminal charges.

Judge Lombard in the majority opinion below in referring to the consequences which would flow from these suits, said (277 F. 2d at p. 744):

> "* * * the district courts would be flooded with suits for injunctions against the use of wiretap evidence and its alleged fruits in the state courts, with the consequent necessity of determining just what evidence was proposed to be introduced and whether the trial had reached such a stage that vindication of the federal right should be subordinated to practical considerations of state law enforcement; and all these determinations would be subject to appeal, with the prosecution obstructed in the meanwhile."

It should not be difficult to imagine the effect of such actions upon State prosecutions. The result would be simply disastrous to the administration of criminal justice in New York.

In *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, this court in an opinion per Brandeis, J., said at *id.* pp. 78, 79:

> "* * * there stands, as a perpetual protest against its repetition, the Constitution of the United States, which recognizes and preserves the autonomy and independence of the States—independence in their

> legislative and independence in their judicial departments. Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the State and, to that extent, a denial of its independence."

Respondents respectfully submit that a decree of a Federal court restraining witnesses in a State criminal action from giving testimony concerning information secured from wiretaps would clearly by an invasion of the sovereign power of New York to maintain its own judicial department.

The difficulties which have arisen in respect of Section 605 stem from the attempts to compel the States to exclude wiretap evidence in conformance with the rule of evidence in the Federal courts. From time to time various theories have been advanced as a means of accomplishing this.

Petitioner now advances a new idea. He asserts that Section 605 is a civil rights statute and, as such, should be enforced by injunction (Petitioner's brief, p. 17).

One may well wonder as to reason for the struggle to find a way which will have the appearances of legal justification for diluting the reserved power of the States for the purpose of enforcing Section 605 more effectively. It would seem that the answer, or at least a clue, can be found in petitioner's brief.

In matter which has been taken from the dissenting opinion of Judge Clark in the Court below, petitioner refers to various estimates as to the extent of wiretapping in New York. Attention is also called to the fact that there "appears to have been only one successful prosecution under the statute." (Petitioner's Brief, pp. 9, 10)

If the figures given were to be accepted as true, they would indicate that, despite the alleged prevalence of wire-

tasting, Section 605 is just one conviction in more than 26 years removed from being completely impotent.

When Section 605 was enacted, Congress intended that it was to be enforced, as are all other similar laws, by the executive branch of the Federal government--not by its judiciary or by the States. Oddly enough, with the exception of the one conviction, the only effect which has been given to Section 605 has been through the Federal courts.

Since the enactment of Section 605, the executive department has never felt this legislation to be applicable to State law enforcement agencies. This is evidenced by the complete absence of any such prosecutions during the 26 years this legislation has existed. It is pure speculation as to what the state of the law might now be had the executive department otherwise interpreted the intent of Congress in enacting Section 605. Is it conceivable that vigorous federal action against state law officers, acting with other intent but to apprehend law breakers, would have continued, without Congress clarifying the intent of this legislation?

Congress has undoubtedly been aware of the administration of its statutory mandate in this field. Its failure to take any further action on the topic for more than a quarter of a century certainly suggests its approval of the interpretation by the executive department of the legislative intent.

The New York Civil Liberties Union and the American Civil Liberties Union, *amici curiae*, in their brief at page 8, assert that the injunction sought by petitioner might have been secured by him in the State courts prior to the trial of the indictments. The two lower court cases cited by them fail to sustain their contention. The inaccuracy of their argument is demonstrated by the most recent pronouncements of the highest court of the State of New York, cited by them at page 5 of their brief, as holding that the manner in which evidence is procured does not affect its admissibility.

A.

No Injunction Should Be Granted. Petitioner Is Not Threatened With Irreparable Injury.

In his complaint, Pugach alleged that if the respondents violated Section 605 by introducing evidence of intercepted telephonic communications at the State criminal prosecutions and he is convicted, he will suffer irreparable injury in that he will be deprived of his liquor license and the license to practice law.

The indictments against Pugach in Bronx County are predicated upon his alleged participation in the acid blinding of a young woman and upon his carrying a loaded firearm concealed on his person. His right to practice law or his right to the liquor license will not be adjudicated upon a trial of those indictments. The loss of these property rights might result from the conviction for either of the crimes charged—not because any evidence at the trial of the criminal charges violated Section 605.

With respect to the question of irreparable injury in the *Stefanelli* case, which is equally applicable to the instant proceeding, this Court declared (342 U. S. at p. 122):

> "No such irreparable injury, clear and imminent, is threatened here. At worst, the evidence sought to be suppressed may provide the basis for conviction of the petitioners in the New Jersey courts. Such a conviction, we have held, would not deprive them of due process of law. Wolf v. Colorado, supra."

Since a violation of Section 605 was made a crime under Section 501, petitioner's demand for an injunction to restrain respondents from committing the crime is contrary to the well established principle that equity does not enjoin the commission of a crime. (*Maguire v. Amrein*, 101 F. Supp. 414, 420, 421.)

An interesting example which demonstrates the absurdity of enjoining the commission of crime would be an action

for an injunction to restrain a defendant from carrying out his threat and plan to murder the plaintiff. There could be no doubt that such crime, if committed, would produce irreparable injury. However, it is equally certain that if the death penalty for murder would not deter the defendant, it could hardly be expected that an injunction decree would do so. Indeed, it is reasonable to assume that one who intended to commit a crime punishable by death, would consent to an injunction so that he might first be punished for contempt of court before suffering the supreme penalty.

The only effect which a court decree could have in enjoining the commission of a crime would be to increase the punishment prescribed by statute for the crime. Whether punishment for a crime should be made greater involves a problem for the legislative branch of the government.

B.

The Temporary Injunctions in the Case at Bar Were Granted Upon the Wholly Unwarranted Assumption That Respondents Had Admitted the Truth of Petitioner's Claim.

Petitioner tells this Court that it is not disputed that respondents tapped petitioner's telephone and divulged the information thus obtained to the Grand Jury and that the district attorney does not deny that he intends to use such evidence at the trials of the two indictments (Petitioner's Brief, p. 4).

It is to be noted that petitioner does not point to a single fact in his complaint or in his papers for the temporary injunction which supports his claim that wiretap conversations were divulged to the Grand Jury or that the district attorney intends to introduce this evidence at the State trials. Petitioner merely says that Judge Medina and Judge Lumbard in stating the facts in their

opinions assumed that respondents were admitting the truth of petitioner's claim (Petitioner's Brief, p. 4).*

To assert that respondents have not denied petitioner's claim is grossly unfair. Petitioner knows full well that when he served his complaint and his papers on the motion in the District Court for a temporary injunction, the respondents cross-moved to dismiss the complaint on the ground that the action was not maintainable. The cross-motion was granted. Consequently, there was no need whatsoever to take issue with the allegations of a complaint which was legally insufficient.

An appeal was taken by petitioner from the judgment of the District Court dismissing the complaint and the order denying the injunction *pendente lite*. Petitioner then applied to the Court of Appeals for the injunctive relief pending appeal. At this point there was no action pending, the complaint having been dismissed. Again, respondents relied upon the fact that the suit was not maintainable.

In granting the injunction, the Court of Appeals in an opinion by Medina, J., stated that petitioner had a "powerful" case because the respondents had not denied the allegations of the complaint.

After hearing the appeal, the Court of Appeals affirmed the order and judgment of the District Court and vacated the "stay". An application was then made by petitioner for a rehearing or in the alternative for a "stay" pending the determination of a petition to this Court for certiorari.

The application for the rehearing was based solely on the record, as the rules of the Court of Appeals provide.

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* The facts stated on page 6 of the brief of the Attorney General of the State of New York, *amicus curiae*, were apparently taken from petitioner's brief or the opinions of the United States Court of Appeals. The Attorney General has not participated in any way in the State prosecutions of Pugach and consequently has no knowledge of the facts.

(Rule 25(b), United States Court of Appeals, Second Circuit; *United States* v. *Giori*, 282 F. 2d 43.) The rehearing was denied but a "stay" pending the determination of the present appeal was granted.

The next step taken by petitioner was a motion addressed to the Court of Appeals to enlarge the scope of the existing injunction. Respondents in opposing this motion asserted that the injunction which was sought to be broadened should not have been granted in the first place because petitioner's claim was without factual support.

A deaf ear was turned to respondents' plea. The Court granted the motion to enlarge the injunction, holding in an opinion by Friendly, J. (280 F. 2d 521) that it was "too late" for the district attorney to tell the Court that they had been granting the injunctions without basis in fact.

The responsibility for granting the unwarranted injunctions cannot be shifted to the district attorney by merely stating that he should have called the Court's attention earlier to the lack of proof. Had the district attorney the slightest idea that the Court of Appeals intended to grant this unprecedented relief, the respondents' contention assuredly would have been made known.

In any event it could properly be assumed that the Court would carefully examine the record. The temporary injunctions could only have been decreed upon the showing made by petitioner in his papers.

In his complaint and in his moving affidavit for the temporary injunction, petitioner made the following unsupported claims: (1) that respondents intercepted telephonic communications by tapping his telephone wires and divulged the information to the Grand Jury of Bronx County, as a result of which two indictments were lodged against him and (2) that he *believes* that respondents intend to use the evidence upon the trial of the indictments.

With respect to the allegation concerning the Grand Jury evidence, it was patent that this claim had been predicated purely upon conjecture. Petitioner did not assert that he had ever inspected the grand jury minutes and, therefore, could not have had any knowledge as to the evidence upon which the indictments were found. It is the policy of law that grand jury proceedings be held secret and that the minutes thereof be not revealed without an order of the trial court. (Section 952-t, Code of Criminal Procedure of the State of New York; *Matter of Martin*, 170 Misc. 919; *People ex rel. Hirschberg* v. *Supreme Court*, 269 N. Y. 392.) Parenthetically, it may be said that the respondents would find themselves in a dilemma in pleading to this allegation of the complaint.

The allegation that petitioner *believes* that respondents intend to use wiretap evidence at the trial of the indictments is just a bare claim which was entitled to no consideration. How can anyone challenge what petitioner believes unless the petitioner sets forth the facts upon which that belief is grounded?

The temporary injunctions decreed by the Court of Appeals restrained respondents from introducing wiretap evidence at the trials of the two aforementioned indictments in the County Court, Bronx County. While thus restrained, the respondent district attorney proceeded with the trial of the indictment which charged petitioner with the crime of carrying concealed on his person a loaded firearm in violation of Section 1897, Penal Law of the State of New York. The jury rendered a verdict of guilty.

A brief resume of the evidence adduced at the State trial as to the manner in which the police secured their information, will demonstrate how frank the petitioner has been in the present action and how wrong the Court of Appeals was in granting the injunctions without a factual basis.

After the police had concluded their investigation into the acid blinding of one Linda Riss, detectives were assigned to arrest petitioner. These detectives apprehended Pugach at about 10:30 A.M. on October 30, 1959, in the lobby of the building where petitioner had his law office. Pugach was carrying his briefcase, and was about to enter an elevator on his way to work, when he was stopped by these officers.

Petitioner was not subjected to any public embarrassment in the lobby but was merely asked to accompany the officers. He walked with the detectives out of the building and across the street, which is one of the widest and most heavily travelled thoroughfares in the County, to the automobile of the officers.

After Pugach was seated in the car, one of the detectives, following police department routine, decided to frisk petitioner. As the officer started to do this, he asked petitioner to open his coat. Pugach, who had his briefcase on his lap, placed it on the floor and unbuttoned his coat.

When the frisking was completed Pugach picked up the briefcase and again rested it on his lap. One of the detectives seated alongside of petitioner then took the briefcase and placed it on the floor between his own feet. As he did so, the detective pulled back the zipper on the briefcase and discovered therein a gun loaded with five live bullets.

The police whose only concern at the time was the acid blinding case, had no more reason to expect that Pugach had a loaded firearm than this Court would have for believing that any particular attorney who steps up to argue an appeal has a loaded gun in his briefcase.

Had the detectives wiretap information, as petitioner claims, or the slightest inkling from any source that Pugach was carrying a loaded gun, it is inconceivable that the police officers would have placed their lives in jeopardy by permitting a prisoner to have a lethal weapon.

The foregoing account of the evidence on the indictment was in no way challenged at the State trial. The circumstances as to how this evidence was discovered was necessarily as well known to Pugach as it was to the respondents.

Petitioner not only deceived the Court below in securing the injunction, he likewise attempted to use that decree to deceive the County Court. Among other things, he moved in the County Court to set aside the above mentioned verdict of guilty on the weapon charge, asserting that the Court had violated the injunction by denying an application by petitioner for a discovery of the State's evidence in advance of the trial.

Of course, the injunction placed no restraint on the County Court. However, the County Court, having no knowledge as to the proceedings in the Federal courts, apparently has been intimidated to the extent that since March 3, 1960, the date of the verdict of guilty, the sentence was postponed on petitioner's insistence until November 9, 1960, a date which petitioner himself finally requested for the pronouncement of the judgment on the verdict. New York law requires that sentences be imposed without delay (*Matter of Hagan* v. *Bohan*, 305 N. Y. 110).

The evidence which respondent district attorney intends to introduce at the trial of the indictment against petitioner and his three confederates for the crimes of Maiming, et cetera, has not been revealed. It is significant, however, that despite the existence of the temporary injunctions the district attorney has constantly endeavored to proceed with the trial of this indictment. Were it not for the interference resulting from the instant suit, the trial would have proceeded on January 7, 1960.

POINT TWO

No constitutional issue is raised upon this appeal. The federal policy of excluding wiretap evidence is strictly a rule of evidence not binding upon the State courts.

On a number of occasions this Court and lower Federal courts have had the opportunity to interpret Section 605 of the Federal Communications Act (47 U. S. C. § 605). There has apparently been no holding in any of these instances that a violation of this statute presents a constitutional issue. As a matter of fact this Court has scrupulously avoided predicating any of its decisions in this field upon constitutional grounds. This is equally true of the parallel problems posed in the unlawful search and seizure cases. It is abundantly clear, from the opinions of this tribunal and other federal forums, that wiretap evidence in federal trials is excluded by virtue of a rule promulgated under the supervisory capacity this Court exercises over federal agencies and courts.

Benanti v. *United States*, 355 U. S. 96;
Nardone v. *United States*, 302 U. S. 379, and 308 U. S. 338;
Schwartz v. *Texas*, 344 U. S. 199;
People v. *Variano*, 5 N. Y. 2d 391;
Cf. *Wolf* v. *Colorado*, 338 U. S. 25;
Rea v. *United States*, 350 U. S. 214.

Even before Section 605 was enacted into law, this Court had already proclaimed that neither the Fourth nor Fifth Amendments to the United States Constitution were violated by the tapping of telephones (*Olmstead* v. *United States*, 277 U. S. 438).

It is significant at this juncture to call the Court's attention to the fact that the respondents have never attempted to introduce wiretap evidence, directly or indirectly, upon either of the two indictments handed up against

petitioner by the Bronx County Grand Jury. One of these indictments, namely, that charging Pugach with the felonious possession of a loaded gun, has already been tried, and a conviction has been obtained. The petitioner, in that case, was found with a loaded revolver in his physical possession and obviously no wiretap evidence was needed and none was used.

The respondents have neither denied nor admitted that wiretap testimony was adduced before the Grand Jury. This does not stem from any lack of candor or equivocation, but rather from the fact that it would be improper for the District Attorney to divulge anything that transpired before the Grand Jury without an order of a Court of competent jurisdiction. The petitioner has admittedly never seen a transcription of the Grand Jury minutes upon either of the indictments. Notwithstanding these facts, the Court below has assumed that wiretap evidence exists. The District Attorney has conceded, *arguendo*, that such evidence is extant. In this Court too, the respondents will concede, for the sake of argument only, that wiretap evidence has been obtained which relates to the petitioner herein.

There has been no declaration or concession, however, on the part of the District Attorney, that wiretap evidence will be used upon the remaining indictment, namely, that charging petitioner with the acid-blinding of a young woman.

The position of respondents is that they will use whatever evidence the interests of justice require provided it may lawfully be adduced in the Courts of the State of New York.

Upon the argument in the Court below the petitioner conceded that the alleged wiretaps were obtained in accordance with the statutory procedures of the State of New York and under a proper warrant of a Court of competent jurisdiction. It is, therefore, submitted that there

is serious question as to whether a Fourth Amendment issue can conceivably be raised by petitioner.

In any event, in parallel situations concerning unlawful searches and seizures, this Court has clearly decided that it will not disturb a conviction of a State Court predicated upon unlawfully seized evidence where the rules in that State permit the admission of such matter (See, *Wolf* v. *Colorado, supra; People* v. *Defore*, 242 N. Y. 13, 21).

POINT THREE

Section 605 does not confer any "rights" upon a defendant in a State criminal proceeding.

Both in the Court below and in his brief upon this appeal, petitioner has insisted that Section 605 has conferred certain "rights" upon him. One of these "rights", Pugach contends, is that no State shall use wiretap evidence, or the fruits thereof, against him in a State criminal proceeding. It is difficult to determine upon what foundation petitioner rests this premise.

In *Goldman* v. *United States*, 316 U. S. 129, this Court, analyzing Section 605, declared (316 U. S. at p. 133):

> *"The protection intended and afforded by the statute is the means of communication and not of the secrecy of the conversation."* (Italics ours.)

If the "right" to which petitioner alludes is one of secrecy, then it would seem that Section 605 is improperly invoked. That statute clearly does not confer any such "right" upon Pugach. The aim of the statute is to protect a means of communication and not to bestow any rights or privileges upon defendants in State criminal actions.

Section 605 is not an anti-eavesdropping law. The statute is clearly limited to situations where electronic devices, actually in contact with the telephone system, are employed. Thus, in *Goldman* v. *United States, supra*, a

listening device attached to the wall was not deemed an interception. Similarly, the use of a small portable transmitter for the purpose of transmitting a conversation with a suspect to officers holding a receiver, is not objectionable so long as defendant's property is not trespassed upon (*On Lee* v. *United States*, 343 U. S. 747). The same thing holds true for long-range observation by searchlights, binoculars or cameras (*United States* v. *Lee*, 274 U. S. 559).

In lower Courts, the Ninth Circuit has declared that listening from an adjoining room by an electronic device was not violative of the statute (*Rayson* v. *United States*, 238 F. 2d 160).

See, too:

United States v. *Guller*, 101 F. Supp. 176;
Reitmeister v. *Reitmeister* (2nd Cir.), 162 F. 2d 691, 694.

In the recent case of *Rathbun* v. *United States*, 355 U. S. 107, this Court declared that listening or recording from one end of a telephone line, at least with the authorization of one of the parties to the conversation, is not contrary to the provisions of Section 605.

This Court, acting under its supervisory powers over the administration of justice in Federal Courts, promulgated a rule of evidence which now precludes wiretap testimony in any federal trial. In every case that respondents could find on the subject, this Court has scrupulously avoided any declaration which would indicate that it was attempting to foist a similar rule of evidence upon the State Courts.

Schwartz v. *Texas*, *supra*;
Benanti v. *United States*, *supra*;

Cf:

Rea v. *United States*, *supra*;
Wolf v. *Colorado*, *supra*;
Elkins v. *United States*, 364 U. S. 206.

In *Schwartz* v. *Texas*, *supra*, it was clearly held that a conviction obtained in a State Court by the use of wire-tap evidence would not be disturbed upon appeal to the federal tribunals where the State's rules of evidence permitted the use of such matter.

The *Benanti* decision, *supra*, specifically indicated that *Schwartz* v. *Texas* was not being overruled since this Court took pains to observe that *Schwartz* v. *Texas* was "not to the contrary" (355 U. S. at p. 106, n. 19).

In parallel situations involving unlawful searches and seizures, this Court has made special efforts to distinguish between the federal rules of evidence and those of the several States. Thus, in *Rea* v. *United States*, *supra*, this Court, while enjoining federal officers from testifying in a State Court with respect to evidence obtained after an illegal search and seizure, nevertheless specifically observed that it was acting under its supervisory powers over federal agencies and was not attempting to enjoin State officials or a State prosecution.

Recently, in *Elkins* v. *United States*, *supra*, this Court again pointedly noted that it was not attempting to lay down rules of evidence applicable to any Courts other than federal. The Court declared (*Elkins* v. *United States*, *supra*, 364 U. S. at p. 216):

> "What is here invoked is the Court's supervisory power over the administration of criminal justice in the federal courts, under which the Court has 'from the very beginning of its history, formulated rules of evidence to be applied in federal criminal prosecutions.' *McNabb* v. *United States*, 318 U. S. 332, 341."

These cases are consistent with the policy re-enunciated by the Supreme Court in *Hoag* v. *New Jersey*, 356 U. S. 464, 468:

> "For it has long been recognized as the very essence of our federalism that the States should have the widest latitude in the administration of their own

systems of criminal justice. See, *Hurtado* v. *California*, 110 U. S. 516; *Maxwell* v. *Dow*, 176 U. S. 581; *West* v. *Louisiana*, 194 U. S. 258; *Twining* v. *New Jersey*, 211 U. S. 78."

In the light of all these decisions and the plain wording of the statute itself, it is manifest that Congress did not endow Pugach, or any other defendant in a State criminal proceeding, with any right of privacy or secrecy with respect to telephonic communications. The policy of the statute is obviously aimed at protecting a means of communication and not at thwarting the enforcement of State criminal laws.

A.

It is Doubtful That Congress Contemplated or Intended That Section 605 Should Apply to State Law Enforcement Agencies and to Thwart or Frustrate Police Investigations.

The Communications Act of 1934 was designed to bring wire and radio communications under the control of a central agency—the Federal Communications Commission. Section 605 appears to be an almost verbatim repetition of the language employed in Section 27 of the Radio Act of 1927 (44 Stat. 1172). The Committee report merely states, with reference to Section 605, that it "is based upon section 27 of the Radio Act and extends it to wire communications" (S. Rep. No. 781, 73d Cong. 2d Sess. 11 [1934]).

As a matter of fact, three years before the enactment of Section 605, Congress failed to pass several bills which forbade wiretapping and excluded such evidence from Federal Courts.

H. R. 23, H. R. 5305, S. 1396, 72d Cong., 1st Sess. (1931);
H. R. 9893, 72d Cong., 1st Sess. (1932);
Cf: 47 Stat. 1381 (1933).

In 1934 Congress passed the Federal Communications Act which includes the section here in issue. It does not

seem likely that Congress would have enacted a bill affecting so controversial a subject without any comment at all, particularly after having rejected several bills forbidding wiretapping and excluding such evidence from use in the Federal Courts, only a year or two earlier. It is therefore, logical to infer that Congress never intended to preclude wiretapping by law enforcement agencies or to interdict the use of such evidence in Court.

The thrust of the statute appears to require application of this prohibition to private wiretapping. In view of the established canon that a general statute need not be construed to bind the Government, it would seem to have been unnecessary to apply the section to governmental wiretapping.

Rosenzweig, *Law of Wire Tapping*, 32 Cornell L. Q. 514, 536;
57 Col. L. Rev. 1159, 1162;
57 Mich. L. Rev. 37, 43;
46 Geo. L. J. 418, 419.

There have been decisions excluding governmental agencies from the prohibitions of a general statute.

e.g. *State* v. *Gorham*, 110 Wash. 330, 188 Pac. 457.

In the *Benanti* case, *supra*, this Court apparently decided that Section 605 included State agents within the purview of its prohibitions. Respondents believe that this point was not actually argued in the *Benanti* case, and, therefore, there is no clear holding to this effect.

In view of the historical development of this section, it is paradoxical that this Court should have determined that State law enforcement agents, acting pursuant to a lawful warrant of a Court, should be prohibited from using such evidence. Such a rule does not enhance the legislative purpose. As a matter of fact the Constitution and laws

of the State of New York are far broader than the federal provision here involved. New York State not only forbids unauthorized wiretapping, but extends this to eaves-dropping generally.

N. Y. Const. art. I, § 12 (1939);
N. Y. Code Crim. Pro. § 813-a;
People v. *Variano*, 5 N. Y. 2d 391;
People v. *Saperstein*, 2 N. Y. 2d 210, cert. denied, 353 U. S. 946.

Moreover, while a violation of Section 605 is a misdemeanor, a violation of the New York laws constitutes a felony in most instances.

There is no doubt that violations of Section 605 and of the New York State laws have been committed and will be committed in the future by private agencies and persons. The policy of New York and of the Federal Communications Act is to prevent interference with telephonic communications.

What the petitioner is actually asking this Court to do is to void a section of the New York Constitution and the statutes enacted pursuant thereto. While Pugach engages in the casuistry of contending that there is no endeavor on his part to have the trial itself thwarted, but that only a suppression of wiretap evidence is sought, it is obvious that petitioner's ultimate aim is to completely frustrate the prosecution of this indictment. If wiretap testimony (or the fruits of wiretaps) should become essential to the establishment of Pugach's guilt, a federal injunction preventing the use of such evidence would, in effect, hobble a successful prosecution of this most heinous crime.

The Court below suggested that there was no prohibition against a trial of the acid-blinding indictment. Such a trial, however, cannot, in good conscience, be prosecuted until this Court has been given an opportunity to resolve the issues involved.

There has been a good deal of speculation as to the extent of wiretapping carried on in this country and particularly in the City of New York. In the April 1960 edition of the Minnesota Law Review there are several articles which highlight the divergence of opinion on this subject. There is clearly a very sharp disagreement as to how extensive wiretapping is.

In a recent book, *The Eavesdroppers*, by Dash, Knowlton and Schwartz (1959), the authors suggest that wiretap is carried on extensively. The authors, themselves, admit that there is no way of gauging the volume of wiretapping that is actually done (Dash, etc., *supra*, p. 68):

> "How much wiretapping is done this way by plainclothesmen is, of course, *a matter of speculation*. Accuracy of the figures, however, is not really essential * * *." (Emphasis added.)

The New York Joint Legislative Committee To Study Illegal Interception Of Communications (The Savarese Committee) determined that only 2392 wiretap orders were obtained throughout the entire State between 1950 and 1955. Dash and his colleagues, however, while citing these figures, inaccurately attribute them to a poll conducted by District Attorney Edward Silver of Kings County (The Eavesdroppers, *supra*, pp. 42, 97-104; 44 Minn. L. Rev. 835, 838).

The United Kingdom, which is not generally associated in the minds of men with the utilization of harsh or arbitrary police procedure, permits wiretapping by police officers under authority of special warrants. Subject to certain safeguards and restrictions, the nations of Denmark, Norway, Sweden, Switzerland, Italy, West Germany, Austria and France, permit wiretapping.

See:

G. Dobry, "Wiretapping and Eavesdropping: A Comparative Survey", J. Int'l Comm'n Jurists, Vol. I, No. 2, 320. (1958).

Former Attorney General Herbert P. Brownell, as well as Presidents Franklin D. Roosevelt and Harry S. Truman and others, have approved wiretapping under proper safeguards (44 Cornell L. Q. 175, 183).

There are widespread misconceptions as to the frequency of police wiretaps. In an article in 44 Cornell L. Q. 175, the authors declare (*id.* at p. 183):

> "There is, furthermore, a widespread misconception as to the frequency of police wiretaps. In a recent book Mr. Justice Douglas of the United States Supreme Court asserted that in 1952 at least 58,000 wiretap orders had been issued in New York City alone. Actually, in that year, all five district attorneys and the police department in New York procured a combined total of only 480 orders! In the United Kingdom, where wiretapping is employed in criminal cases where warrants are issued, the number of such warrants averaged slightly under 200 per year from 1952 through 1956, and never exceeded 241 in any one year."

It is, of course, impossible to determine how many unauthorized wiretaps are made by private individuals acting illegally. This, however, is a situation with which both the State of New York and the federal government are concerned. New York's laws, therefore, are in harmony with the spirit and policy of Section 605 of the Federal Communications Act in prohibiting unlawful interference with telephonic communications. In New York, of course, the statute is much broader.

B.

It Was Unnecessary and Improper for the Court Below to Stay the Use of Evidence Obtained as a "Fruit" of Wiretaps.

The Court below on July 12, 1960, enlarged the scope of the stay to include the "fruits of wiretaps" as well as wiretaps themselves. Why this should have been done is difficult to understand, unless the Court completely misin-

terpreted both Section 605 of the Federal Communications Act and the prior decisions of this Court. Incidentally, Judges Medina and Waterman in February, 1960, had refused to enlarge the scope of the temporary stay to include the fruits of wiretapping. This fact did not bother the Circuit Court in the least although it was specifically called to its attention.

The policy of Section 605 is to prevent an interference with telephonic communications. The *divulgence* of the communication would seem to be what is forbidden. If absolute secrecy were the object, then the cases which permit tapping with the consent of one of the parties to the conversation (*Rathbun* v. *United States, supra*) and the use of wiretaps against parties not participating in the conversation (*Goldstein* v. *United States*, 316 U. S. 114), would seem to be inconsistent. Obviously secrecy is not the aim of the statute (*Goldman* v. *United States, supra*).

The extension of the thrust of the federal rule to include the fruits of wiretaps, was a matter within the discretion of this Court in its supervisory capacity over the trial of matters in federal tribunals (See, *Nardone* v. *United States*, 308 U. S. 338). To extend the statute's scope, however, to the fruits of wiretaps with respect to State agents would seem to be an unwarranted intrusion upon State rules of procedure and out of harmony with the Congressional intent in enacting Section 605 (Cf: 57 Col. L. Rev. 1159, 1163).

The only purpose of extending Section 605 to include the fruits of wiretaps in the Federal Courts, was to properly enforce the exclusionary rule of evidence created by this Court. No similar rule of evidence exists in the State of New York. It is, therefore, difficult to conceive how any person can violate this statute unless they actually divulged the wiretap conversation itself. The Court below adverted to the second *Nardone* case (308 U. S. 338) as authority for enlarging the scope of the stay. In doing so,

however, that Court completely overlooked the fact that the *Nardone* case was limited to Federal Courts only. This enlargement, however, rendered it even more difficult to commence the trial on the acid-blinding indictment.

It is of extreme significance that petitioner has not demonstrated that wiretap evidence will in fact be used at his impending trial. He suggests that divulgences were made to the Grand Jury, but readily admits that he has never seen the Grand Jury minutes. Perhaps Pugach is endowed with certain occult or prescient powers which enable him to prognosticate what will occur at some future trial. Upon such flimsy conjecture, however, it is submitted that this Court and the Federal Courts generally ought not to interfere with and thwart the effective prosecution of crime in State Courts. For all petitioner and this Court know, the alleged wiretaps may have been obtained with the consent of one of the parties thereto. It would be necessary, however, for the Federal Courts to hold a hearing and perhaps a full trial on an injunction action whenever an allegation is made that wiretap evidence may be introduced.

POINT FOUR

Federal courts should not enjoin State criminal proceedings.

There is authority in this Court for the proposition that wiretapping, pursuant to the New York State statutory procedures, does not violate Section 605 of the Federal Communications Act. In *People* v. *Stemmer*, 298 N. Y. 728, the New York Court of Appeals affirmed a judgment of conviction obtained by using wiretaps, without opinion, but with the following decision (298 N. Y. at p. 729):

> "Judgment affirmed. Upon this appeal the following question was presented ..... necessarily

passed upon: The appellants contended that the receipt in evidence of wire tapped telephone calls was illegal because of section 605 of the Federal Communications Act of 1934 (U. S. Code, tit. 47, § 605). This court held to the contrary. (See *Matter of Harlem Check Cashing Corp.* v. *Bell*, 296 N. Y. 15.) No opinion."

This Court affirmed this case in 336 U. S. 963 by a divided Court.

This case is in line with the position taken by respondents under Point Three-A, *supra*.

Cf.: *People* v. *Saperstein*, *supra*.

To urge, as has the Court below, that the prosecution itself is not being enjoined is a "Pickwickian" distinction. As noted above, if wiretap evidence became essential, the prosecution itself would fail. In *Voci* v. *Storb*, 235 F. 2d 48, the Third Circuit denied injunctive relief relying upon this Court's decision in *Stefanelli* v. *Minard*, 184 F. 2d 575, aff'd 342 U. S. 117. In *Voci* v. *Storb*, *supra*, the Court declared (235 F. 2d at pp. 48, 49):

> "It will be noted that both prayers for relief are directed to the use of the alleged information or testimony gained by wire tapping in court proceedings against the plaintiff. He says that his rights are given by the Federal Communications Act, § 605, 47 U. S. C. A. § 605.
>
> We are unable to see any distinction between the problem of the propriety of federal intervention at this stage presented in this case and that in Stefanelli v. Minard, 3 Cir., 1950, 184 F. 2d 575, affirmed with the opinion by Mr. Justice Frankfurter in 1951, 342 U. S. 117, 72 S. Ct. 118, 96 L. Ed. 138."

The dissent in the Court below attempted to equate the present problem with that presented in the school segregation cases. It does not seem conceivable that such a parallel can be drawn. This Court must distinguish between promis-

cuous use of wiretaps by private agencies and authorized wiretap under constitutional and statutory fiat. The respondents do not for a moment attempt to condone the use of "illegal" wiretapping under private auspices.

It is a fundamental precept that equity will not ordinarily enjoin a criminal prosecution. It has already been demonstrated, *supra*, that the alleged *irreparable injury* does not emanate from the threat that wiretap evidence may be used at an impending trial in the Bronx County Court. Pugach has been convicted of a felony which was clearly not dependent upon the use of wiretap or the fruits thereof. To argue now that his property rights may be affected by another conviction is ridiculous. Any further conviction for another felony which may result from the impending trial for acid-blinding, would merely have an accumulative effect since the damage has already been accomplished by the guilty verdict on the gun indictment.

Judge Potter Stewart (now a Justice of the Supreme Court) summarizes the policy arguments against the Federal Courts granting such injunctive relief in the case of *Faqua* v. *United Steel Workers of America*, 253 F. 2d 594, 597, 598:

> "* * * federal courts of equity should conform to clearly defined Congressional policy, '* * * by refusing to interfere with or embarrass threatened proceedings in state courts save in those exceptional cases which call for the interposition of a court of equity to prevent irreparable injury which is clear and imminent. * * *'
>
> "It is a familiar rule that courts of equity do not ordinarily restrain criminal prosecutions. No person is immune from prosecution in good faith for his alleged criminal acts. * * * Where the threatened prosecution is by state officers for alleged violations of a state law, the state courts are the final arbiters of its meaning and application, subject only to review by the [the Supreme] Court on federal grounds appropriately asserted. Hence the arrest by the federal

courts of the processes of the criminal law within the states, and the determination of questions of criminal liability under state law by a federal court of equity, are to be supported only on a showing of danger of irreparable injury both great and immediate.'" 319 U. S. at pages 163-164, 63 S. Ct. at page 881.

"These standards were restated in Stefanelli v. Minard, 1951, 342 U. S. 117, 72 S. Ct. 118, 96 L. Ed. 138. There the context was a different one, but the controlling policy identical."

CONCLUSION

The judgment should be affirmed.

Respectfully submitted,

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